rather than to the facts of the case or to a particular statute or certain provisions of that statute to which the case may relate. The mere fact that a person from abroad has been retained as counsel or solicitor and given instructions by a litigant or has given legal opinion in a case whether prior to or after the coming into force of the amendment to the Advocates and Solicitors Ordinance, is insufficient to clothe him with special qualifications or experience for the purpose of that particular case. Unless this interpretation is adhered to, we might find every foreign practitioner had to be admitted under section 8A merely because a litigant in this country had retained him or had sought legal opinion from him in a particular case, and thereby make a hole in the provisions of the Ordinance through which could be driven an articulated vehicle.

As regards the transitional period, the short answer to this argument is that the Ordinance as amended does not provide for transitional provisions. In any event, the applicant could not be said to have been caught by surprise by the act of the legislature. The amendment was first published in the *Gazette* on April 16, 1970 to take effect from October 1, 1970, but for some reason, the date of coming into force was postponed to January 1, 1971. (See *Gazette* Notification No. P.U.(A) 234 dated July 9, 1970). There was, therefore, sufficient notice for the applicant to dissociate himself from the case in question.

Assuming for a moment that the applicant has special qualifications or experience for the purpose of this particular case, the next issue to be determined is whether such qualification or experience is of a nature not available amongst local advocates and solicitors. For the determination of this particular issue, it is necessary to consider the nature and type of the case in which the applicant wishes to appear as senior counsel for the appellant company. It is common ground that the company is aggrieved by the decision of the Comptroller of Income Tax as regards the assessment to tax for the years 1966 and 1967, and has appealed to the Special Commissioners of Income Tax. From paragraphs 3 to 8 of the affidavit of Mr. Ronald T. S. Khoo, the appeal involves interpretation of certain provisions of the income tax law in this country; the main issue being whether the company's assessments for the relevant years are governed by the cessation provisions of the Income Tax Ordinance, 1947 or by the provisions of paragraph 104(b) of the transitional and savings provisions embodied in Schedule 9 of the Income Tax Act, 1967. Having regard to the facts disclosed in the affidavit, I am unable to agree that the case involves issues of such legal complexity that it requires a counsel who is an expert or specialist in income tax law to handle it. I am, therefore, in complete agreement with one of the grounds of objection raised by the Attorney-General and the Bar Council in their notice of objection that the proceedings before the Special Commissioners of Income Tax for which the applicant is briefed is one which can quite competently be handled by an advocate and solicitor of Malaysia.

Having regard to all the relevant factors in this case, I find the facts as set out in the supporting affidavit fall short of the requirement of section 8A(2)(a) of the Advocates and Solicitors Ordinance. The applicant has failed to satisfy me that for the purpose of that income tax appeal he has special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia.

The application is accordingly dismissed.

*Application dismissed.*

Solicitors: *Shearn, Delamore & Co.*

---

## FAN YEW TENG v. PUBLIC PROSECUTOR

**[F.C. (Azmi L.P., Ong C.J. (Malaya), Suffian, Ali and Ong, F.JJ.) September 16, 1971]**

**[Kuala Lumpur — Federal Court Criminal Appeal No. 7 of 1971]**

*Criminal Law and Procedure — Trial — Case transferred from sessions court to High Court — No preliminary inquiry held — Whether trial before High Court a nullity — Criminal Procedure Code (F.M.S. Cap. 6), ss. 183, 177 and 417.*

In this case the appellant had been originally charged before the president, sessions court under section 4(1)(c) of the Sedition Act. He applied to a judge for the transfer of his trial to the High Court and the High Court made the order prayed for. He was subsequently tried before the High Court and was convicted and sentenced *(Sub nom. Public Prosecutor* v. *Ooi Kee Saik & Ors.* [1971] 2 M.L.J. 108). On appeal it was argued *inter alia,* that the trial before the High Court was a nullity as the appellant had not been committed for trial after a preliminary inquiry as required by section 138 of the Criminal Procedure Code.

**Held** (Ali F.J. dissenting): the trial in this case was held in contravention of section 138 of the Criminal Procedure Code which provides that no person shall be tried before the High Court unless he has been committed for trial after a preliminary inquiry and therefore the trial was a nullity.

*Cases referred to:-*

(1) *T.T. Rajah* v. *R.* [1963] M.L.J. 281.

(2) *Fung Yin Ching* v. *Public Prosecutor* [1965] 1 M.L.J. 49, F.C.

(3) *Subramania Ayyar* v. *King Emperor* I.L.R. 25 Mad. 61, 97.

(4) *Magor and St. Mellons Rural District Council* v. *Newport Corporation* [1952] A.C. 189.

FEDERAL COURT.

*Dato' S. P. Seenivasagam* (*D. P. Xavier* and *Sahadevan* with him) for the appellant.

*Tan Sri Mohamed Salleh bin Abas* (Solicitor-General) (*Gunn Chit Tuan* with him) for the respondent.

*Cur. Adv. Vult.*

**Azmi L.P.** (delivering the judgment of the majority): The appellant was convicted together with three others of having committed an offence under section 4(1)(c) of the Sedition Act 1948 (Revised — 1969) punishable under section 4(1) of the said Act. He has appealed to this court against both his conviction and sentence.

He was originally charged before the president of the sessions court but on 16th March 1971 he applied to a judge under section 417 of the Criminal Procedure Code for the transfer of his trial to the High Court. Abdul Hamid J. made the order prayed for. Pursuant to that order of transfer the appellant was brought before the High Court on 3rd May 1971 and tried, not by Abdul Hamid J. himself, but by another judge, Raja Azlan Shah J., by whom he was duly convicted and sentenced.

The appeal raises a number of grounds, in the forefront of which is the appellant's contention that the trial was a nullity. With the agreement of counsel on both sides we decided to hear full argument first on this preliminary point, since the question of jurisdiction goes to the root of the whole appeal. The appellant's submission is that —

(1) his trial was a nullity, rendering his conviction null and void, because the trial was conducted in contravention of the express prohibition contained in section 138 of the Criminal Procedure Code, which provides that no person shall be tried before the court of a judge unless he shall have been committed for trial after a preliminary inquiry;

(2) his trial was held before a judge other than the judge who made the order for transfer, contrary to the provision in section 417 of the Criminal Procedure Code that the judge making the order try the case himself;

(3) the failure to hold a preliminary inquiry was not only in contravention of the express provisions of section 138 but also an incurable defect which prejudiced the appellant in his defence.

We shall deal first with the objection raised under section 417 the relevant portion of which reads: —

"Whenever it is made to appear to a Judge....

(b) that some question of law of unusual difficulty is likely to arise.... he may order.... that any particular criminal case be transferred to and tried before himself...."

It was contended that, since Abdul Hamid J. made the order of transfer, he himself should have tried the case, in compliance with the express provisions of section 417, although there is no suggestion that the change affected the outcome in any way. The learned Solicitor-General, in answer, directed our attention to the corresponding section in the Criminal Procedure Code of Singapore where "High Court" is substituted for "Judge" and "itself" for "himself" The rules of syntax, he explains, requires the pronoun "himself" to be used when the antecedent subject is "Judge", just as "itself" should be the correct reflective when the antecedent is "the High Court". In our opinion the logic is inescapable. There is neither rhyme nor reason in holding that the same judge must try the case once he has made the order of transfer. All judges of the High Court exercise similar powers and the personality of the judge can in no way affect the conduct or result of the trial. After all, what the accused is only concerned about in making an application for transfer from the subordinate court is that a difficult question of law should be determined by a higher tribunal, more competent to deal with it. We accordingly hold that there are no merits in this particular ground of appeal.

The next objection, under section 138, however, poses a problem of unusual difficulty. We are unable to trace any Malayan case in which section 138 fell to be construed in similar circumstances. Neither Indian authorities nor the two Singapore cases cited to us by learned counsel for the appellant, namely, *T. T. Rajah* v. *R.*[1] and *Fung Yin Ching* v. *Public Prosecutor,*[2] are of much relevance because the corresponding provisions in the Criminal Procedure Codes of India and Singapore are not wholly in *pari materia* with ours. In the case of *T. T. Rajah,* for instance, the learned Chief Justice of Singapore said in his judgment —

"Section 176 of the Criminal Procedure Code, which is the relevant section under which this application ought to be considered, specifically provides that the High Court may make an order that any particular case shall be transferred to and tried before the High Court without any qualifying words at all and in my view the discretion conferred by this section is not limited to a discretion to remit the case to a subordinate court for a preliminary inquiry with the view to committal of the accused for trial by the High Court. In my view section 176 enables the High Court in a proper case to make an order transferring any particular criminal case from a subordinate court direct to the High Court for trial by the High Court and for the High Court thereupon to dispose of that particular case by way of summary trial."

The distinction between section 137 (Singapore) and our section 138 is that in the latter appear the additional provision, namely, "and no person shall be tried before such court unless he shall have been committed for trial after a preliminary inquiry under the provisions of this Chapter." There is no such precondition to a High Court trial in Singapore. In *Fung Yin Ching's* case, the explanation was clearly set out in the judgment of Thomson, L.P. and calls for no further exegesis.

Under the circumstances, we must deal with the point now raised under section 138 as *res integra.* The section reads as follows:

"138. The following procedure shall be adopted in inquiries before a magistrate where the inquiry is held with a view to committal for trial before the court of a judge, and no person shall be tried before such court unless he shall have been committed for trial after a preliminary inquiry under the provisions of this Chapter."

Counsel for the appellant strenuously contends that the second limb in our section 138 is not to be construed as a meaningless excrescence merely because section 417 remains silent as to what follows an order of transfer. Once such an order is made, he argues, section 138 comes into operation because, in effect, the order means a committal of the accused for trial in the High Court and, in categorical terms, it is provided that no one shall be tried before the court of a judge unless he shall have been committed for trial after a preliminary inquiry.

On the other hand the learned Solicitor-General just as strongly contends that this case, being triable in the sessions court, was clearly not a committal case and the mere fact that it was transferred for hearing before a judge — for special reasons and in the exceptional circumstances provided for by section 417 — does not transmogrify the case into one of a differ-

ent character. A non-committal case remains a non-committal case and the fact that section 417 does not specify any precondition to a trial in the High Court must be taken to show that the Legislature refrained from so stipulating because an application by the accused for the transfer was for his own advantage and any provision in his favour can be dispensed with if he so elects. Indeed the appellant, and the other co-accused, all of whom were defended by eminent and experienced counsel were content with the order of transfer and never raised any objection to the competency of the High Court to try the case without there having been a preliminary inquiry needed to formulate the charge. There is much force and truth in this argument.

We have given the arguments on both sides most anxious consideration. The crux of the problem is whether or not we should give full effect to the second limb in section 138. It declares in the plainest terms that *no one* shall be tried by a judge unless and until there has been a preliminary inquiry. We cannot overlook what their Lordships of the Privy Council said in *Subramania Ayyar* v. *King Emperor*[3] that —

"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity....

The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that, when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, this contravention of the Code comes within the description of error, omission, or irregularity."

In our view the fact that both the prosecution and the defence at the trial were in apparent agreement that no preliminary inquiry was required under section 417 cannot derogate from the application of section 138. No default by the defence or waiver or agreement by the parties can supercede the written law — especially in criminal matters.

We have perused the record with utmost care and we are satisfied that dispensing with the preliminary inquiry in this case did not by one iota prejudice the defence. We are also abundantly satisfied that the conduct of the trial was impeccable. Indeed we would go further and say that the defence now raised is so purely technical in character that the requirement of going through the motions of a preliminary inquiry can be nothing but an egregious exercise in futility. The second limb of section 138, nevertheless, makes such an exercise inevitable and we express the hope that its deletion by Parliament will not be unduly postponed. But, since section 138 in our view makes no special exception for a High Court trial where a criminal case goes before it by way of an order of transfer under section 417, we have reached the conclusion, with the utmost reluctance, that the duty of this court is to give effect to the law as it stands, rather than what it might have been had this contingency been contemplated. We are accordingly constrained to hold and declare the trial a nullity, with all the consequences that follow in such event.

**Ali F.J.** (dissenting): I regret to say that I am unable to agree with the majority view.

The only point to consider is whether the trial of a case transferred to the High Court by an order under section 417 of the Criminal Procedure Code is a nullity by reason of the fact that it was not preceded by a preliminary enquiry as required by section 138. As far as I am aware there is no authority on the point for or against. The question falls to be considered upon the proper construction of the relevant provisions of the Criminal Procedure Code.

The appellant on whose application the transfer order was made is contending that in view of section 138 his trial is a nullity. Section 138 clearly provides that "no person shall be tried before such court unless he shall have been committed for trial after a preliminary inquiry". I would construe these words to mean that an accused person is given the right to insist on a preliminary inquiry in every case where the prosecution intends to have the offence tried by the High Court. To that extent it will be correct to say that the High Court which undoubtedly has jurisdiction to try the offence cannot by reason of section 138 take cognizance of it until the accused has been committed for trial. An accused person can insist on a preliminary inquiry as of right for the reason that he will have the opportunity of knowing before his trial the nature of the evidence against him and the charge which will ultimately be preferred against him. Above all, there is always the possibility that he will be discharged at the end of the preliminary inquiry for insufficient evidence. But in this case the prosecution had no intention whatsoever of having the case tried before the High Court. They have brought the case to the court of the special president who has jurisdiction to try and who could take cognizance of the offence. There was, therefore, no question of the appellant having a right to insist on a preliminary inquiry. But for some reason he wanted his case to be tried in the High Court. An accused person charged with an offence in the surbordinate court has no right to insist that he be tried in the High Court. That is my considered view of the law. But under the Criminal Procedure Code two ways are open to him by which he can have his case transferred to the High Court for trial. He can apply to the magistrate for a transfer under section 177 in which case the section expressly provides that there must be a preliminary inquiry with a view to committal. But if his application is refused by the magistrate his case remains in the magistrate's court for trial. Alternatively, or in the event of a refusal by the magistrate, he may apply to the High Court under section 417 for a transfer. This section, unlike section 177, contains no provision for a preliminary inquiry with a view to committal. It gives the High Court judge the power to grant an application for transfer, and the exact words of the section relating to transfer are that the judge "may order that any particular case be transferred to and tried before himself;". In the words of the learned Chief Justice of Singapore in *T. T. Rajah* v. *R.*[1] on section 176 of the Singapore Criminal Procedure Code, the section "specifically provides that the High Court may make an order that any particular case shall be transferred to and tried before the High Court without any qualifying words at all..." Likewise, section 417

contains no qualifying words as those found in section 177 of our Criminal Procedure Code. The principle of interpretation is that where the words of a section in a statute are plain, the court must give effect to them, and the court is not justified in depriving the words of their only proper meaning in order to give effect to some intention which the court imputes to the legislature from other provisions of the Act. Such a course can only be justified where a literal construction of the section is inconsistent with the meaning of the statute as a whole. In my view, section 417 is designed for a special situation and as such can be regarded as an exception to the general rule laid down in section 138. The legislature is presumed to know the law. If provision for a preliminary inquiry with a view to committal is expressly provided in section 177 the legislature would, if so minded have made similar provision in section 417. The plain and literal meaning of "transfer" which is the only word used in section 417 is to remove a case from one venue to another. As was stated in *Magor and St. Mellons Rural District Council* v. *Newport Corporation*,[4] in the construction of a statute the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed. To do so would be to usurp the functions of the legislature.

In this case it was the appellant and not the prosecution who applied for a transfer of the case which could be summarily disposed of in the sessions court. If section 417 is to be construed as restricting the power of a High Court judge to make a direct transfer without a preliminary inquiry such a construction might lead to a result which I consider irrational or unfair. To adopt the view that this case ought to have been tried only after a preliminary inquiry is to invite the possibility that the appellant may be discharged at the conclusion of the inquiry for insufficient evidence. Should that happen the purpose for which section 417 was enacted would be completely nullified or frustrated. In my respectful view different provisions of a statute should be given an interpretation which would make them consistent, rather than one which makes one provision inconsistent with the other. Section 417, as I have construed it, is in my judgment consistent with section 138. By this I mean that in an exceptional case a person can be tried by the High Court even though he has not been committed for trial after a preliminary inquiry. I so rule.

*Trial declared null and void.*

---

## MUNICIPAL COMMISSIONER, MALACCA v. TEH CHWEE SWI

**[A.Cr.J. (Sharma J.) October 4, 1971]**

**[Malacca — Criminal Appeal No. 1 of 1971]**

*Criminal Law and Procedure — Appeal in the name of departmental head instead of Public Prosecutor — Effect of — Criminal Procedure Code (S.S. Cap. 21) s. 402(6), (8)(ii) (b).*

This was an appeal by and in the name of the Municipal Commissioner. The respondent was charged under section 144(10)(b) read with section 144(10) of the Municipal Ordinance, and was convicted and sentenced to a fine of $150. This appeal concerned the refusal of the learned magistrate to make a mandatory order contemplated under section 144(10) of the Municipal Ordinance.

The issue for determination was whether the commissioner could file an appeal in his own name and right under the provisions of the Straits Settlements Criminal Procedure Code.

**Held:** the Public Prosecutor was the only person who could have appealed by virtue of section 402(6) of the Straits Settlements Code. Therefore the present appeal by the commissioner was incompetent and accordingly dismissed.

MAGISTRATE'S CRIMINAL APPEAL.

*S. C. Navarednam* for the appellant.

*Anthony Taye* for the respondent.

**Sharma J.,** (delivering oral judgment): This is an appeal by and in the name of the Commissioner of the Municipality of the Town and Fort of Malacca. The respondent was charged under section 144(10)(b) read with section 144 (10) of the Municipal Ordinance in that he had replaced the attap roofing of premises No. A Jalan Bukit Serendit with ardex sheets without the prior approval of the Municipality. The respondent was convicted and sentenced to a fine of $150. The prosecuting officer applied for a mandatory order for the replacement of the ardex roofing with attap roofing under section 144(10) of the Municipal Ordinance. The learned magistrate did not make the mandatory order as required under section 144(10) and the present appeal is against that part of the order of the learned magistrate which refused to make a mandatory order contemplated under section 144(10) of the Municipal Ordinance. The only point of interest in this appeal is whether the Commissioner of the Municipality of the Town and Fort of Malacca can file an appeal in his own name and right under the provisions of the Criminal Procedure Code. Section 402(1) of the Straits Settlements Criminal Procedure Code reads as follows: —

"The Attorney-General shall be the Public Prosecutor and shall have the control and direction of criminal prosecutions and proceedings under this Code."

An appeal to the High Court is a proceeding under the Code. Section 402(8)(ii)(b) creates an exception in that an officer of a government department or local authority can appear and conduct any prosecution for an offence against any written law which it is the duty of the department or authority specially to enforce. That provision, however, is confined to summary non-seizable cases triable in the court of a magistrate. If that provision was not there in the Criminal Procedure Code it would not be competent for an officer of a government department or local authority to appear and prosecute a case in which that depart-